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No. 328

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

MEIER & POHLMANN FURNITURE COMPANY,
a Corporation,
Appellant,

vs.

HAROLD J. GIBBONS, Individually and as Officer, Agent and Member, Representative of Warehouse & Distribution Workers' Union, Local 688, A. F. L., Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, A. F. L., and All Other Members of Said Local Union, et al.,
Appellees.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

FORDYCE, MAYNE, HARTMAN, RENARD & STRIBLING,
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To the United States Court of Appeals for the Eighth Circuit.

Meier-Pohlmann Furniture Company, hereinafter called plaintiff, prays that a Writ of Certiorari issue to review the final judgment of the U. S. Court of Appeals for the 8th Circuit in the case of Meier-Pohlmann Furniture Company, Appellant, v. Harold J. Gibbons et al., Respondents, No. 15,402.

CITATIONS TO OPINION BELOW.

The opinion of the U. S. Court of Appeals for the 8th Circuit is reported at 233 F. (2) 295, Federal Reporter Advance Sheets for July 9, 1956, and is supplied with the record following at volume entitled "Supplemental Record". The opinion of the U. S. District Court for the Eastern Judicial District of Missouri, Eastern Division, is reported at 113 F. Supp. 409, and appears in the record at page 165, Volume 1.

The opinion and judgment of affirmance of the U. S. Court of Appeals for the 8th Circuit was entered on April 26, 1956, and plaintiff's timely Motion for Rehearing was by that Court denied by its order entered May 23, 1956. The order overruling the Petition for Rehearing appears in the record at the second to last page.

JURISDICTION.

The jurisdiction of this Court to review by Writ of Certiorari the judgment of the Court of Appeals for the 8th Circuit is founded upon the provisions of Title 28, U. S. C. A., Sec. 1254 (1), the cause having been properly before that Court of Appeals under Title 28, U. S. C. A., Sec. 1291, and before the U. S. District Court for the Eastern Judicial District of Missouri under the provisions of Title 49, U. S. C. A., Sec. 9, Sec. 319, Title 29, U. S. C. A., Sec. 187, and Title 28, U. S. C. A., Secs. 1331, 1337. The suit having been grounded upon alleged violations by the defendants of the provisions of Title 49, U. S. C. A., and Title 29, U. S. C. A., and requiring the interpretation and construction and reconciliation of the provisions of those titles, both of which contain specific provisions for District Court jurisdiction, and requiring a decision and interpretation of federal statutes and the determination of

federal questions, and there being a sufficient jurisdictional amount involved, the District Court was possessed of jurisdiction, and in its opinion and judgment exercised such jurisdiction.

THE QUESTIONS PRESENTED.

I.

1. The plaintiff, a furniture manufacturing concern with a plant in the City of St. Louis, Missouri, was engaged in a labor dispute with its production employees in February, 1952, and upon rehiring a production force, required the services of the defendant carriers.[1] The defendant motor carriers had entered into contracts with their employees providing picketing line and/or hot cargo clauses and assignment of work provisions.[2] These contracts were general through the carrier industry in a 12-state midwestern area,[3] and pursuant to the provisions of these contracts, the employees refused to serve plaintiff's establishment with pick-up and delivery service and/or other carrier service generally provided,[4] and the carriers thereafter refused such service to the plaintiff, maintaining that service was not practicable in view of the employer-employee contracts.[5]

The first question presented is whether the provisions of the Interstate Commerce Act and Motor Carriers Act,

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[1] Record pp. 154-158.

[2] Motor Carrier Defendants' Answers: Interstate Dispatch, Inc., Southern Plaza, pp. 24 and 28, Par. 15; Central Motor Freight, Rec. p. 17; Ben Gutman, Rec. p. 14; Roadway, Rec. p. 19.

[3] Testimony of Hayes, Rec. p. 126.

[4] Union's answers, Rec. p. 34.

[5] Pre-Trial Order, Rec. pp. 91 and 92.

respecting the obligations of carriers to render non-discriminatory service[6] and the provisions of those acts prohibiting employees of carriers (licensed to operate under the Interstate Commerce Act) from inducing, aiding and abetting discriminations[7] prohibit contracts between carriers and carrier employees which effectively prevent the rendition of carrier service in the circumstances of existence of a picket line,[8] or otherwise stated may the mandatory or inhibitory provisions of the Interstate Commerce and Motor Carrier Act be superseded by private

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[6] U. S. v. B. & O. R. R. Co., 333 U. S. 169, 92 L. Ed. 618; State of New York et al. v. U. S., 331 U. S. 284, 91 L. Ed. 1492.

[7] "The corporation is made civilly liable under Section 8. As every locomotive engineer of the defendant companies is a 'person employed by' a common carrier corporation subject to the provisions of the Interstate Commerce Law, he is guilty of the offense described, and subject to the penalty imposed by Section 10, if he, while acting as engineer for his corporation, refuses to handle interstate freight for the complainant, and thereby, in his discharge of a function of the company, willfully omits to do an act required by the law to be done; and it is immaterial whether what he does or fails to do in violation of the statute is with or without orders of his principal."

Toledo AA & NM Ry. Co. v. Pennsylvania Co., 54 Fed. 730.

The same holding is made in: Buyer v. Gilliam, 271 F. 65; Chicago, B. & Q. Ry. Co. v. Burlington C. R. & N. Y. Ry. Co., 34 F. 481; Montgomery Ward v. Northern Pac. Terminals et al., 128 F. Supp. 475.

See also Ex parte Lemon, 166 U. S. 548, 60 L. Ed. 1110, enforcing 54 Fed. 730.

The holding of the Eighth Circuit in this case (1956), that there is nothing in the Interstate Commerce and Motor Carriers Act prohibiting agreements and contracts protecting carrier-employee discrimination, is made without citation of authority and without discussion. See to the contrary the Eighth Circuit (1954) holding, Pacific Gamble. In view of the social importance of such a holding, it should not pass without review.

[8] Such agreements between the carriers were specifically held illegal in view of the Interstate Commerce Act in the cases cited, Footnote 7, supra.

contracts executed between carriers and their employees pursuant to collective bargaining arrangements.[9]

Subsidiary to this question are the following questions which are presented:

a. Is the demand by labor unions and the employees they represent for the picket line, hot cargo and assignment of work clauses an inducement to, encouragement to, solicitation of discrimination or evasion of the provisions of Title 49, USCA, Secs. 1 (4), 10 (1) and 10 (4), Secs. 316 (B) 4 (D), 322 (C)?[10]

b. Does the proviso contained in the Labor Management Relation Act in Title 29, USCA, Sec. 158 (B) 4, Sec. 187, alter, modify or repeal the Interstate Commerce Act and Motor Carriers Act resstrictions upon employee activity in respect to limitation of service so that through the collective bargaining process the employees may, while remaining in service, induce discrimination or themselves discriminate in the rendition of service and by contractual

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[9] Private contractual arrangements may not affect the public transportation policy expressed in the Interstate Commerce Act or Motor Carriers Act:

U. S. v. B. & O. R. R. Co., 333 U. S. 169, 92 L. Ed. 618;
Menasha Paper Co. v. Chicago N. W. R. Co., 241 U. S. 55, 60 L. Ed. 885;
Minneapolis St. Louis Ry. Co. v. Pacific Gamble Robinson, 215 F. (2) 126;
Central Transportation Co. v. Pullman Palace, 135 U. S. 24, 35 L. Ed. 55.

[10] Union collective bargaining and demands for contractual provisions prohibited by statute are not protected:

Southern Steamship Co. v. NLRB, 325 U. S. 797, 89 L. Ed. 1939;
U. S. v. Employing Lathers Association, 347 U. S. 186, 98 L. Ed. 618;
International Longshoremen v. Juneau Spruce Co., 189 F. (2) ..., affirmed 34 U. S. 237, 97 L. Ed. 275;
Western Union Telegraph Co. v. American Communications etc. CIO, 86 N. E. (2) 162 (N. Y.);
American News Co., 55 NLRB 1302 (1944).

protection of employee refusal to serve in thir collective bargaining agreement, immunize both the carrier employer and themselves?[11]

c. Does the fact that the contracts were coerced from the carriers through concerted employee action in the furtherance of collective bargaining change their character in relation to the Interstate Commerce and Motor Carriers Act?[12]

II.

2. Prior to February, 1952, the Central States Drivers Conference, an association of all local teamster unions operating in a 12-state mid-western area, adopted a policy that their membership should not cross picket lines or handle hot cargo.[13] These unions in joint negotiation with the carriers' associations operating interstate in the 12-state midwest area affected and on a local basis in the St. Louis area, were able by use of economic strength to coerce agreements with the carrier groups involved to insert picket line clauses or hot cargo clauses in their labor contracts, together with assignment of work provisions, which provide for the assignment of the performance of the type of work involved in the contract to the persons covered under the contract.[14] After the commencement of the strike at plaintiff's plant, some pick-up and delivery service continued from approximately July, 1952,

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[11] Cases Footnote 10, supra, to the contrary.

[12] Economic coercion or dominance of one party to an illegal agreement does not excuse the other. Interstate Circuit et al. v. U. S., 306 U. S. 208, 83 L. Ed. 610. The Court of Appeals' opinion alludes to the economic dominance of the unions as bearing upon the agreements without citation or independent discussion.

[13] Admission of Fact, Plaintiff's Ex. 27, Rec. pp. 254, 255, 256.

[14] Morse testimony, Rec. pp. 159-162.

to late spring, 1953. In the spring of 1953, however, the International Union established its trusteeship of all local unions directly involved and the unions then under trusteeship engaged in the following stipulated conduct: The unions advised their membership "in language sufficient to convey the union desire" that where appropriate under the employment contracts, the union membership should either (a) refuse to cross the picket line at plaintiff's plant, or (b) refuse to handle hot cargo originating from or to be delivered to plaintiff's plant.[15] In addition, it was stipulated that the unions maintain within their organization machinery in which complaints concerning violation of union policy could be prosecuted and the membership be tried upon alleged violation.[16]

The second question presented is whether advice of the character referred to above and in the circumstances described, constitutes union conduct designed to induce, encourage or coerce a concerted refusal in the course of the carrier employees' employment to handle plaintiff's goods for purposes prescribed by the Labor Management Relations Act and Section 187.

STATUTES INVOLVED.

The statutory provisions involved are: Interstate Commerce Act, 49 U. S. C. A., Sec. 1 (4), 1 (10); Motor Carriers Act, 49 U. S. C. A., Sec. 316 B & D, Sec. 322 C; Labor Management Relations Act, 29 U. S. C. A., Sec. 187 (A) 4, 187 B. The text of these provisions appear hereinafter as Appendix A.

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[15] Pre-Trial Order, Rec. pp. 93, 94.

[16] Admission of Fact, Plff's Ex. 27, Rec. pp. 255, 256.

STATEMENT OF FACTS.

The plaintiff filed its petition, together with a motion for temporary injunction in June, 1953. After disposing of pre-trial motions and restricting the issues by pre-trial conferences, the cause came on for hearing on plaintiff's second amended petition in October, 1954.

A decision in favor of defendants was rendered and affirmed in the Court of Appeals hereinbefore.

a. **The plaintiff's situation.**

Plaintiff is a furniture manufacturing company, located in the City of St. Louis, Misosuri. Its plant is not served directly by a railroad siding and it is, therefore, dependent upon motor carriers for its transportation service, both for motor transport as such, and as a link to rail facilities, where such are utilized for long haul service.

On or about February 12, 1952, a picket line was established at plaintiff's premises by Local 25 of the Upholsterer's Union, A. F. L., who represented plaintiff's production employees. Other employees did not join in the strike. Production operations were interrupted for a time, but being unable to reach an agreement with the picketing union, plaintiff began in April, 1952, rehiring a production force, and by July, 1952, the new production employees (a full production force) had reached a state of training to enable plaintiff to resume full production. During this period, some mass picketing had occurred, and there was much name calling and some threatening of plaintiff's new employees (testimony of Arthur Meier, Rec. pp. 154 and 158).

On July 7, 1952, the Circuit Court of the City of St. Louis issued an injunction (Exhibit 1-D-6) on plaintiff's petition (Exhibit 1-D-7) restraining violence, threats and mass picketing, and thereafter there were only 1 to 3

pickets patrolling the neighborhood of plaintiff's two block plant (testimony of Arthur Meier, Rec. pp. 155 and 158).

After this time and throughout the rest of the picketing until June, 1954, there was some name calling between plaintiff's employees and the pickets, but no violence until an incident involving the parking of an automobile by a picket blocking access to a driveway in September, 1953, on which incident plaintiff unsuccessfully attempted to secure a contempt citation (Exhibit 1-D-5, Rec. p. 265) and the stabbing of an employee of plaintiff in a fight with a picket at a United States Post Office (Exhibit 1-D-1, Rec. p. 257) in December, 1953, upon which a contempt citation and total prohibition of picketing were sought by plaintiff (Exhibit 1-D-4, Rec. p. 263) and (Exhibit 1-D-3, Rec. p. 261).

There was no evidence of threats to carrier employees or violence toward them even during the period prior to the issuance of the circuit court injunction July, 1952. After this there were only one to three pickets. Upon appearance of the picket line in February, 1952, all pick-up and delivery service on less than full truckload shipments was refused (Underhill, Rec. p. 141) and plaintiff's drivers were not assisted at the carrier dock (Boyce, Rec. pp. 148, 149). Throughout this period, July, 1952, to June, 1954, plaintiff continued to operate its own trucks to and from the plant. Certain of the carriers conntinued to spot full truck-trailer loads at plaintiff's curb, without incident,[17] until June, 1953, when this practice was stopped by

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[17] Neither the carriers nor the unions pleaded violence as a basis of refusal of service, but rather that the employee refusal to serve under the contracts formed the basis of service impracticability. Both the trial and appellate court held that the presence of violence *could* have served as a grounds for refusal of service. E. g., 233 F. (2), l. c. . . . .:

"Moreover, we have heretofore found for defendants on the impracticable operation issue on the basis that the evidence

the carriers (Underhill, Rec. p. 142) as a consequence of union conduct detailed hereinafter. During the same period, July, 1952, to April, 1953, the Ben Gutman Truck Service rendered off-track station service on behalf of defendant New York Central, and other railroads not parties here, whose terminals are on the east bank of the Mississippi. (This service was discontinued after that date as a consequence of union activity detailed hereinafter.) After April and June, 1953, Roadway Express and L. A. Tucker refused all service to plaintiff (Plaintiff's Exhibits 4E and IV A) and plaintiff was totally shut off from all pick-up-delivery and off-track service (Underhill, Rec. p. 142).

b. **The union organization and program.**

The Central States Teamster Conference is an organization composed of all teamster locals in the twelve state middle western area including the City of St. Louis, and States of Missouri and Kansas. Sometime prior to February, 1952, this organization and all its local members adopted a policy that no union member of the Conference or its locals should cross a picket line or handle unfair

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supports a finding that pick-up and delivery service by the carriers was excused by reason of violence and threatened violence on the picket line. Such finding and the evidence supporting it could well afford the basis for an inference that the violence and threats thereof on the picket line were the inducing cause for the refusal of the carriers' employees to cross the picket line."

Neither such court held that violence or threatened violence actually did motivate the refusal of service in view of the uncontroverted evidence to the contrary. See Ex. IV, A, Rec. p. ....

Hayes, Rec. p. 126 et seq.;
Dunne, Rec. p. 121 et seq.;
Rodemeier, Rec. p. 124 et seq.;
Hall, Rec. p. 119 et seq.

And the defendants' pleadings to the contrary:

International Union Answer, Rec. p. 60 et seq.;
Answers of Defendant Carriers, Rec. p. 9 through 60.

goods. (Union admissions, Plaintiff's Exhibit 27, Rec. pp. 254, 255 and 256.)

These unions began demanding the inclusion of clauses in their contracts with the carriers that the carriers should not require their employees to cross picket lines in about 1948 and in 1952 demanded, in addition, that contract provisions exempt employees from handling "unfair" goods. The unions also demanded agreements from the carriers that no other personnel be permitted to do the work (Morse, Rec. pp. 159, 161 and 162).

In addition to the advice given the men that the union did not wish them to cross picket lines, referred to in the pretrial order (Rec. p. 92), the unions admitted that members violating the policy of not crossing picket lines and not handling unfair goods, would be called before the executive committee of the local union for disciplinary purposes or that one member might make such a charge against another, which would then be tried by the local union (Union admissions, Plaintiff's Exhibit 27, Rec. pp. 255, 256, 257) subject to the appeals provided in the union constitution (Exhibit 1-D-2, Sec. XVIII, Rec. p. 257).

On March 2, 1953, the defendant International Teamsters Union took over the administration of Locals 600, 610, 632, 682 and others in the St. Louis area by appointment of Thomas E. Flynn, an international vice president, as Trustee. Local 600 (over-the-road drivers, city chauffeurs and helpers employed by interstate motor carriers) and Local 632 (dockmen, platform workers employed by the same carriers) were merged into one union Local 600. The trusteeship of the International Union (which as such represented the employees of the Railway Express Agency, Exhibit 1E, Rec. p. 232), thus gave the International Union with the aid of Local 688, full charge of all union agents of the rail carriers from that time to the time of trial (Union admissions, Plaintiff's Ex. 27, Rec. pp. 251, 252).

c. **The Negotiation of the Written Contracts.**

In February, 1952, the following listed carrier defendants L. A. Tucker, Anderson, Roadway, Riss, Lovelace, Husmann & Roper, Pie, Central Motor Freight, Consolidated Forwarding, Interstate, Eastern Motor Freight and Southern Plaza, together with all other interstate carriers from point to point by motor truck operating in the Missouri Kansas Area, through the agency of the Missouri Kansas Carriers Conference, to which all belong, jointly negotiated a labor contract (Morse, Rec. p. 160) with the Central States Drivers Council, an organization of local Teamster Unions (including in St. Louis Local 600), whose members drove "over-the-road or long haul" for those carriers (Pltf. Ex. 1a). In August, 1952, the same listed carriers, together with all other interstate carriers from point to point by motor truck operating in and out of the Terminals in St. Louis Area, through the agency of the St. Louis Motor Carriers Council, to which all belong (Morse, Rec. pp. 159, 160), negotiated labor contracts with Local Teamsters Union 600 and 632. After the merger previously described, the members of Local 600 included all City Chauffeurs, Helpers and Dockmen employed by the carriers referred to above and some of the over the road drivers. These contracts, which were in force during the time during which plaintiff's plant was picketed, were extended or renewed and continued to be in force at time of trial (Gibbons, Rec. p. 164).

The contracts resulting from these negotiations resulted in contracts containing either a so-called hot cargo clause or picket line clause, or both.

d. **The "shutting off" of plaintiff.**

In August, 1952, some six months after the beginning of the strike at plaintiff's, the plaintiff was again producing furniture and to have need of volume carrier service.

The motor carriers uniformly refused pick-up and delivery service on less than truckload lots, because, as their pleadings and the evidence showed, their employees uniformly refused to perform this service (Underhill, Rec. p. 141). Because of the existence of the contracts made by the motor carriers with their employees, no company discipline of the men was permitted nor were the carriers free to procure the services of other employees or new men to perform the service (see contracts above) and (pleadings above). However, a number of the carriers, including Roadway Express, L. A. Tucker Eastern Motor Express and Riss & Co., were able to persuade some drivers to spot full trailer load shipments at plaintiff's plant and all carriers expressed a desire to serve plaintiff, as shown by the evidence and their pleadings (Underhill, Rec. p. 141).

The practice of full trailerload spotting at plaintiff's plant continued without incident from August, 1952, to March, 1953, as did off-track station service at Ben Gutman Truck Service, Inc. (Underhill, Rec. p. 142). In March, 1953, the International Union placed under trusteeship Local Unions 600, 610 and 632 and others (Pltf. Ex. 27, Rec. pp. 251, 252), and beginning in April, 1953, the business agents of these trusteed locals specifically instructed the employees at the docks of certain carriers that they were not to handle plaintiffs, that the companies were not to handle them, and threatened discipline to the men (Hall, Rec. pp. 119, 120; Dunne, Rec. pp. 121, 124). After these occurrences, the latest being the early part of June, 1953, no further service of these types were performed by any carrier. Thereafter Roadway Express Company and L. A. Tucker Company refused all service and Eastern Motor Express received no more truckload shipments inbound at its St. Louis Terminal. None of any of this service was restored until about the time the one remaining picket was removed in June, 1954 (Underhill, Rec. pp. 142, 147, 148).

The Railway Express Agency and the Railroad Defendants stopped all pick-up and delivery service upon the appearance of the picket line (Pltf. Ex. 4-F, Rec. p. 244; Ex. 4-H, Rec. p. 246; Ex. 20 [2-A], Rec. p. 250, and Ex. 20-D-2, through 20-D-6, Rec. pp. 291-295).

Ben Gutman rendered off-track service, but no pick-up or delivery from August, 1952, to April, 1953, but after the occurrences mentioned in the second paragraph above, even off-track station service was discontinued (Gutman, Rec. pp. 128, 129). The off-track service mentioned above was customarily offered under the tariffs of the New York Central and certain other railroads not parties defendant, but signatories to Plaintiff's Exhibit 3 (Gutman, Rec. p. 129).

None of the carriers or carrier organizations ever took any legal steps to determine the validity of their conduct or that of their employees, or the unions at any stage of the proceedings described above.

The discontinuance of the carrier practice of spotting full trailer loads at plaintiff's plant and the rendition of off-track station service by the railroads through Ben Gutman Truck Service, Inc., stopped in the late spring of 1953 after the International Union had taken charge of the locals involved and after the conduct of the unions described hereinabove under "Questions Presented, Sec. 2."

REASONS FOR GRANTING WRIT.

I.

It is a matter of greatest public importance for this Court to determine whether the policy of non-discriminatory public transportation embodied in the Interstate Commerce Act and the Motor Carriers Act has been modified by the Labor-Management Relations Act to such an extent

that the carriers coming within these acts, may, at the instance of the collective bargaining agents of their employees, contract away their statutory responsibility.

The problem is nationwide. The evidence in this case indicates that the contractual arrangements by the carriers and their employees were entered into on an area basis encompassing 12 midwestern states. Similar area arrangements exist in other regions of the country.

The opinion of the Court of Appeals in this case holds that there is nothing in the transportation acts which prohibits such contractual arrangements. The holding to this effect is made by the Court of Appeals without any citation of authority or independent discussion, and is clearly contrary to the earlier decisions of many Federal Court jurisdictions, including, inferentially, the Supreme Court.[18]

This holding of the Court of Appeals is, we believe, in conflict with the decision of this Court in Southern Steamship Company v. NLRB,[19] which involved a comparable question with respect to the private rights of employees of a shipping company under the Wagner Act, in relation to the provisions of the Federal Shipping Act, 46 USCA, Section 1, et seq.

The opinion in this case to the contrary creates great uncertainty in the practical commercial community as well as ignoring this Court's prior decisions.

II.

The question of the extent to which unions may, through internal disciplinary regulations, coerce their membership in the exercise of employee rights guaranteed under the

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[18] See Footnote 7, supra.

[19] Southern Steamship Co., v. NLRB, 325 U. S. 797, 89 L. Ed. 1939.

Labor-Management Relations Act, by signal, advice or suggestion in a particular instance, has been the subject of decisions in the Seventh and Tenth Circuits in the cases of Washington-Oregon Shingle Weavers [20] and Joliet Contractors.[21] The decision of the Eighth Circuit in this case that the conduct of the union was not actionable under 29 USCA, Section 187, conflicts directly with the decision of the two aforementioned circuits. Inasmuch as the determination of this question is of national importance, and inasmuch as it is necessary for the conduct of employer-employee relationship to know with certainty the state of the law in this respect, we submit that it is important that this Court review the decision of the Eighth Circuit in this case, and settle the matter in which the conflict now exists.

CONCLUSION.

We respectfully, therefore, pray that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review its record in Civil Cause No. 15,402, Meier & Pohlmann Furniture Company, a corporation, Appellant, v. Harold J. Gibbons etc. et al., Appellees.

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[20] NLRB v. Washington-Oregon Shingle Weavers Assn., 211 F. (2) 149.

[21] Joliet Contractors Assn. v. NLRB, 202 F. (2) 606, cert. denied 346 U. S. 824.

APPENDIX A.

The Statutes Involved.

The statutes directly involved are 49 USCA, Sec. 1 (4):

"(4) **Duty to Furnish Transportation and Establish Through Routes; Division of Joint Rates.** It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers."

49 USCA, Sec. 10 (1) and (4):

"Sec. 10—**Violation of Regulations by Carriers; Discrimination; Penalties.—**

"(1) **Violation by carrier or officer; penalty.** Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any reciver, trustee, lessee, agent, or person acting for or employed by such corporation, who alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this chapter

prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense: **Provided**, that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years or both such fine and imprisonment, in the discretion of the court."

"(4) **Inducing unjust discrimination; penalty; liability for damages.**

"If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers, or agents, to discriminate unjustly in his, its, or their favor against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty

of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom. (Feb. 4, 1887, c. 104, § 10, 24 Stat. 382; Mar. 2, 1889, c. 382, § 2, 25 Stat. 857; June 18, 1910, c. 309, § 10, 36 Stat. 549; and Feb. 28, 1920, c. 91, § 414, 41 Stat. 483.)"

49 USCA, Sec. 316 (B) and (D):

"(B) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

"(D) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for

such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever, or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; Provided, however, that this subsection shall be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

49 USCA, Sec. 322 (c):

"**Participation in unjust discrimination; evasion of regulations; penalty.**

"(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this chapter, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and wilfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this chapter for less than the applicable rate, fare, or charge, or who shall knowingly and wilfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this chapter provided for

motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $500 for the first offense and not more than $2,000 for any subsequent offense."

And 29 U. S. C. A., Sec. 187 (a) (1) (4) and 187 (b):

"(a) it shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;"

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such em-

ployees whom such employer is required to recognize under subchapter 11 of this chapter.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of Section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Office - Supreme Court, U.S.
FILED
AUG 18 1956
JOHN T. FEY, Clerk

No. 328 .

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

MEIER & POHLMANN FURNITURE COMPANY,
a Corporation,
Appellant,

vs.

HAROLD J. GIBBONS, Individually and as Officer, Agent and Member, Representative of Warehouse & Distribution Workers' Union, Local 688, A. F. L., Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, A. F. L., and All Other Members of Said Local Union, et al.,
Appellees.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FORDYCE, MAYNE, HARTMAN, RENARD & STRIBLING,
WALTER R. MAYNE,
NELSON W. HARTMAN,
THOMAS ROWE SCHWARZ,
506 Olive Street,
St. Louis, Missouri,
Attorneys for Appellant.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,402.

Meier & Pohlmann Furniture Company, a Corporation,
Appellant,
vs.
Harold J. Gibbons, Individually, and as Officer, Agent and Member, Representative of Warehouse & Distribution Workers' Union, Local 688, A. F. L., Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, A. F. L., and All Other Members of Said Local Union, et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[April 26, 1956.]

Thomas Rowe Schwarz (Fordyce, Mayne, Hartman, Renard & Stribling was with him on the brief), for Appellant.

Gregory M. Rebman and Harold I. Elbert, for Appellees.

LaTourette & Rebman and Gregory M. Rebman were on the brief for Appellees Anderson Motor Service, Inc., Hussman & Roper Freight Lines, Inc., Lovelace Truck Service, L. A. Tucker Truck Lines, Inc., and Consolidated Forwarding Co., Inc.

Thompson, Mitchell, Thompson & Douglas; Edmonstone F. Thompson; and Harold I. Elbert were on the brief for Appellees Southern Plaza Express Co., Inc., and Interstate Dispatch, Inc.

T. D. Drury was on the brief for Appellees Ben Gutman Truck Service, Inc., and Central Motor Freight, Inc.

Wiley, Craig & Armbruster and Harry Craig were on the brief for Appellees Harold J. Gibbons and Union Defendants.

Rosenfeld and Wolfe and Robert G. Wolfe, LaTourette & Rebman and Gregory M. Rebman were on the brief for Appellee Eastern Motor Express, Inc.

Max Sigoloff was on the brief for Appellee B-Mac Transport Co., Inc.

Bryan, Cave, McPheeters & McRoberts and William H. Charles were on the brief for Appellee Roadway Express, Inc.

Albert E. Schoenbeck was on the brief for Appellee Wabash Railroad Company.

Wilton D. Chapman was on the brief for Appellee New York Central Railroad Company.

William R. Gentry and Herbert E. Bryant were on the brief for Appellee Railway Express Agency, Inc.

Harlan & Harlan and John L. Harlan were on the brief for Appellee Riss Truck Lines.

Paxton H. Ackerman was on the brief for Appellee Pic Freight Co., Inc.

Before Gardner, Chief Judge, and Woodrough and Van Oosterhout, Circuit Judges.

Van Oosterhout, Circuit Judge.

This is an appeal from final judgment dismissing on its merits the action of Meier & Pohlmann Furniture Company, a Corporation, plaintiff below and appellant here, against two railroads, a pick-up and delivery service under contract with the railroads, one express company, thirteen motor carriers, two local unions, one international union, and one union official. For convenience we will generally refer to the parties as plaintiff and defendants.

Plaintiff was engaged in the furniture manufacturing business in St. Louis, Missouri. Labor trouble developed between the plaintiff and its employees represented by the Upholsterers' Union, not a party to this action, which ripened into a strike in February, 1952. It is stipulated that such strike was a legal one in the sense that it was called by a union certified by the National Labor Relations Board as bargaining agent for certain of plaintiff's employees. The strikers set up a picket line. The facts bearing upon the issue of violence on the picket line will be developed hereinafter. After the institution of the strike at plaintiff's plant, it became increasingly difficult for plaintiff to get transportation service at its plant, particularly pick-up and delivery service. Such service tapered off until in the spring of 1953 pick-up and delivery service became practically unavailable. Since the termination of the strike in June of 1954, plaintiff has had no transportation or labor problems. During the strike period, save a few minor exceptions, the carrier defendants have handled outgoing and incoming freight and express shipments for plaintiff where outgoing shipments were delivered to the carriers' docks or stations and incoming items were received at such docks or stations.

Plaintiff's petition is in four counts. In Count I plaintiff seeks damages for business loss claimed to have resulted from failure of the carriers to furnish transportation, particularly pick-up and delivery service, charging

all defendants had illegally conspired to and did discriminate against plaintiff by failing to render transportation service generally provided to shippers, thereby violating the duties imposed upon the carriers by 49 U. S. C. A., §§ 1 and 316 (b). In Count I-a the plaintiff eliminates the conspiracy charge, and seeks damages for the same injury against all defendants, based upon the individual wrongful action of each defendant. Count II complains of a secondary boycott by the union defendants, charging violations of 29 U. S. C. A., § 187, and seeks damages against the union defendants. Count III is for injunctive relief, asking that the defendants be required to furnish plaintiff transportation service.

The defendants have filed separate answers which vary as to contents. All defendants deny the conspiracy charge, and each denies that the plaintiff has stated a cause of action against the answering defendant. Defendants, New York Central and Wabash, assert that because of the strike and the picket line they are excused from performing pick-up and delivery service by the pick-up and delivery tariff in effect, providing in part as follows:

> "Nothing in this tariff shall require the carrier to perform pick-up or delivery service at any location from or to which it is impracticable, through no fault or neglect of the carrier, to operate vehicles because of:
>
> * * * * * * *
>
> "(C) Any riot, strike, picketing or other labor disturbance."

The motor carriers assert that they are excused from furnishing pick-up and delivery service by their impracticable delivery tariff, substantially the same as the one pertaining to the railroads just set out. In addition, the motor carriers allege that they have a labor contract with their employees containing, among other things, union shop and picket line clauses.

Because of the voluminous pleadings and the variations in the defenses asserted, we deem it advisable to set out verbatim plaintiff's contentions in its brief as to the issues raised. Plaintiff states:

"The issues upon trial became:

"a. Was the refusal of the carriers and their employees or agents to provide pick-up and delivery service and in some cases other transportation service, an unjust discrimination in violation of the Interstate Commerce Act and the Motor Carriers Act?

"b. Was the request of the plaintiff for service reasonable within the meaning of these acts or did the Impractical Operations Tariff Rule (where applicable) excuse the carriers from serving plaintiff?

"c. Did the written contracts between the carriers and their employees and agents (entered into as described in the evidence) providing that the employees could refuse to cross picket lines or perform work in an instance in which a picket had been established and which prohibited the carriers from employing others to do the work, excuse the rendition of service or when considered with the other actions of the defendants to a conspiracy not to render the service at the unions' discretion?

"d. Did the participation of those carriers (Wabash, New York Central and Railway Express Agency) who had no written contract provisions to the effect described in (c) above in the general program with the unions, sufficiently join them to the union induced plan of discrimination to make them co-conspirators?

"e. Did the activities of the unions in connection with the inducement of employee refusal to serve Plaintiff amount to a violation of the Labor Manage-

ment Relations Act, in particular 29 U. S. C. A., Sec. 187?

"f. Did the entry into such agreements by the carriers with their employees restrict the freedom of the carriers to establish reasonable and just practices and, if so, whether the enforcement of such agreements should be enjoined?"

For convenience we will treat the issues raised by the plaintiff under the following headings and in the order here stated:

1. c and d, Conspiracy Issue.

2. a and b, Impracticable Operation Issue.

3. e, Boycott Issue.

4. f, Injunction Issue.

This case was tried to the court without a jury. Our scope of review is prescribed by Rule 52, Federal Rules of Civil Procedure. The finding of fact of a trial court may not be set aside unless there is no substantial evidence to support it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law. **Pendergrass v. New York Life Ins. Co.**, 8 Cir., 181 F. 2d 136, 137. The trial court had jurisdiction under 49 U. S. C. A., §§ 9 and 319, and 28 U. S. C. A., §§ 1331 and 1337. We have jurisdiction under 28 U. S. C. A., § 1291.

We shall now proceed to consider the plaintiff's contentions.

1. **Conspiracy Issue.**

Plaintiff claims that all defendants entered into and carried out a conspiracy to deprive the plaintiff of normal transportation facilities. Plaintiff relies upon the evidence that all motor carriers entered into contracts with their

employees which included a picket line clause, contending that such a picket line clause is illegal in that it disabled carriers from performing their statutory transportation duty; and that ultimately during the progress of the strike at plaintiff's plant all carriers, including the railroads, stopped pick-up and delivery service at plaintiff's plant. The picket line clauses in the various contracts between the motor carriers and their employees vary slightly, but all provide in substance that it will not be a violation of the labor contract or cause for discharge of an employee for an employee to refuse to cross a picket line that has been legally authorized.

The Labor Management Relations Act specifically recognizes the right of an employee to refuse to cross a picket line legally established against an employer other than his own. 29 U. S. C. A., §§ 158 (b) (4), 187, and 187 (a). The Supreme Court speaks of the sections just cited in **National Labor Relations Board v. Rockaway News Supply Co., Inc.**, 345 U. S. 71, as follows (p. 80):

> "In the section by which the Labor Management Relations Act prescribes certain practices of labor organizations which shall be deemed unfair, there is a proviso that nothing therein 'shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act . . .' This clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree. * * *"

It seems clear that a picket line clause in a contract is entirely legal so far as the Labor Management Relations Act is concerned. There is nothing in such Act which

states its provisions are not applicable to motor carriers, neither is there anything in the Motor Carriers Act which directly prohibits a picket line clause. We can find no reason why the parties, if they so choose, cannot validly insert a picket line clause in their labor contract. It would not necessarily follow that the insertion of such a clause would prevent a strikebound plant from making a reasonable request for transportation service, or that the refusal by an employee protected by a picket line clause to cross a picket line would furnish the carrier a defense under an impracticable operation clause. However, the fact that the Interstate Commerce Commission approves an impracticable operation tariff of the type hereinabove quoted would seem to have some bearing on the reasonableness, as a matter of public policy, of permitting such a clause in a labor contract involving transportation.

In **Montgomery Ward & Co., Inc., v. Consolidated Freightways, Inc.**, 42 I. C. C. 225 (M. C. C.), the Commission construed an impracticable operation tariff quite similar to, but not quite as broad as, the one before us in this case. Montgomery Ward filed a complaint with the Commission against thirteen motor carriers, alleging failure to furnish transportation and pick-up and delivery service, claiming that such conduct was unlawful and discriminatory, and asking that the carriers be ordered to cease and desist from such violations of their duty. The carriers' employees, in compliance with the rules of their union, refused to cross the picket line. The complainant contended that the carriers made no real effort to service the plant after the picketing, that the fear of a strike by the carriers of their own employees was mere conjecture, and that no effort had been made to employ nonunion labor to operate the trucks. The Commission dismissed the complaint, stating that because of the strike at the complainant's plant and the refusal of the carriers' employees to cross the picket line, the carriers were phys-

ically prevented from serving Montgomery Ward ,and accordingly their conduct was within the limitations and conditions of the applicable tariff with respect to impracticable operation and not unlawful. A contrary result was reached by the United States District Court for the District of Oregon in a case arising out of substantially the same facts as the case before the Commission. See **Montgomery Ward & Co., Inc., v. Northern Pacific Terminal Co.**, 128 F. Supp. 475.

We have serious doubt whether the parties to the labor contracts involved in our present case engaged in an unlawful act in negotiating the labor contracts that were signed. In any event we agree with the conclusion of the trial court that the plaintiff has failed to carry its burden of proof on the conspiracy issue, whether or not the picket line clause is illegal. The motor carriers who entered into the contracts containing the picket line clause did so because of economic pressure asserted upon them, and for the purpose of stopping and preventing strikes against them by their own employees. The employers were by law compelled to bargain collectively with their employees. It is a common and approved practice for negotiations to settle labor controversies to be worked out by joint committees representing industry and labor. There was nothing illegal or unusual in the circumstance that the terms of the contract, which covered many other matters in addition to the picket line clause, were worked out by joint committees representing capital and labor. It should be noted that the railroads, the express company, and Gutman did not participate in any such negotiations, and that the railroads do not have any picket line clause in their contracts. There is nothing in the record whatever to tie in the railroads or the express company with the negotiation of the motor carriers' labor contracts.

The labor contracts containing the picket line clause were entered into long before the strike at plaintiff's plant

occurred. It can not be fairly inferred from the record that the motor carriers by agreeing to the picket line clause had any intention of curtailing their transportation service to the plaintiff or to anyone else. Moreover, the manner in which the pick-up and delivery service was discontinued after the picket lines were set up negatives any idea of preconceived conspiracy. The pick-up and delivery services afforded by the carriers did not cease at the same time. Some such services were furnished by some of the carriers until the spring of 1953, or more than a year after the commencement of the strike. Some carriers managed to get into the plant, and others parked trucks for unloading at the curb just outside the picket line. A number of the defendants continued to attempt the deliveries from time to time throughout the period of the strike.

Under this record we do not believe the actions of the various carriers in the cessation of the deliveries can be considered parallel. However, if so considered, the mere proof of parallel behavior does not conclusively establish that such behavior was induced by unlawful agreement. **Theatre Enterprises, Inc., v. Paramount Film Distributing Corp.**, 346 U. S. 537. See **Pevely Dairy Co. v. United States**, 8 Cir., 178 F. 2d 363. In the **Theatre Enterprises** case, the Court, in considering the evidence bearing on the issue of conspiracy, states (p. 540):

> "The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. * * *"

In our present case, upon the record made, a finding that the stoppage of services stemmed from the individual decision of the carrier defendants, rather than as the result of any concerted or planned action, is warranted.

We are convinced that the finding of the trial court that the defendants did not enter into a conspiracy is not clearly erroneous.

2. **Impracticable Operation Issue.**

The railroads and motor carriers involved in this action were engaged in interstate commerce and were operating under authority granted by the Interstate Commerce Commission. Such railroads and motor carriers are obligated to furnish transportation upon reasonable request therefor at fair rates and without discrimination. 49 U. S. C. A., §§ 1 and 316.

Plaintiff contends that each defendant is individually liable for damages to plaintiff occasioned by the failure of each individual defendant to carry out its obligation to furnish transportation. It is clear very little pick-up and delivery service was afforded plaintiff during the period from the spring of 1953 until the end of the strike and the withdrawal of pickets in June of 1954. Between the time of setting out the pickets in February, 1952, until the spring of 1953, some such service was afforded, but such service gradually declined as the carriers' employees encountered resistance and refused to cross the picket lines. Defendant carriers contend that they are excused from rendering pick-up and delivery service by reason of the impracticable operation tariff hereinabove set out.

Questions as to the reasonableness of rules, regulations, and tariffs are for the Interstate Commerce Commission, and until found unreasonable by it, a shipper may not maintain an action in any court against a carrier upon the claim that any rule or regulation is unreasonable and that through its enforcement it has sustained loss or damage. **Baltimore & Ohio R. Co. v. Brady**, 288 U. S. 448, 456; **Pennsylvania R. Co. v. Puritan Coal Mining Co.**, 237 U. S. 121, 131. However, when the validity of the rule is not attacked, a shipper may bring an action in the courts grounded upon its violation or discriminatory enforcement. Here, the plaintiff admits the validity of the tariff regulation, and then states in its brief:

> "To interpret the impracticable operation tariff to permit carrier refusal to serve in these cases upon the mere appearance of a picket line would give it a meaning in violation of and contrary to the purposes of the act, whereas to interpret it to mean that when a strike or picket line exists at a shipper's plant the carrier may responsibly evaluate that condition objectively in the light of possible harm to his property or employees in determining the reasonableness of the shipper's request for shipment is to give it a proper and legal meaning."

We are here concerned with the construction and interpretation of the tariff, not with the question of its validity.

Although pick-up and delivery service was developed by railroads subsequent to the establishment of station to station service and the history of the development of this supplementary service is discussed in the briefs and by the trial court, we doubt whether this history has any important bearing on the issues confronting us. Pick-up and delivery service comes within the definition of "transportation" as contained in 49 U. S. C. A., § 1 (3) as to railroads, and § 303 (a) (19) as to motor carriers, and consequently such service is subject to regulation by the Commission.

The trial court, in holding that the carriers were excused from furnishing the pick-up and delivery service, places considerable reliance upon this court's decision in **Minneapolis & St. Louis Ry. Co. v. Pacific Gamble Robinson Co.**, 215 F. 2d 126. In that case a shipper sued for damages occasioned by the railroad's failure to furnish it with cars on a siding adjacent to its plant. The issue was whether under the circumstances of that case plaintiff's request for transportation was reasonable within the meaning of 49 U. S. C. A., § 1 (4). A legal strike was in progress against the shipper. The railroad employees refused to cross the picket line. The evidence on the presence and

danger of violence on the picket line was in dispute. This court held that there was evidence to support the finding of the trial court that the shipper's request for cars was reasonable, although it is conceded in the opinion that there would have been sufficient evidence to support a contrary conclusion by the finder of facts. The test laid down for determining whether the shipper's request is reasonable is thus stated (p. 132):

> "The existence of a strike against a shipper—at least where, as here, there is involved no contractual tie, or other specific community of labor interest, between the unions of the carrier's employees and the shipper's employees, by which the actions of the carrier's employees are controlled—is, in its carrier aspect, simply a condition in the shipper's situation, which, like any other special obstacle or difficulty of abnormal shipper-situation, the carrier has the right to responsibly evaluate, on all its elements, as a question of whether the situation thus fairly constitutes the shipper's demand for service from the carrier as one of 'reasonable request' under the statute."

It is clear from the **Pacific Gamble Robinson** decision that an employer is not required to subject his employees to risks of injury or harm, the court stating (p. 132):

> "* * * It would hardly be a reasonable request for carrier service, for a shipper to demand in effect, by virtue of that result necessarily being inherent in any attempted compliance, that a railroad require its employees to spill their blood in his existing strike situation, or that it compel them to subject themselves and their families to a real and substantial danger of retalitory bodily harm in their outside life from his striking employees."

In our present case the trial court made the following findings:

> "During the existence of the picket line there was some violence, peace disturbance, profanity, attempt to crowd a truck to the curb, the following of 'strike-breakers', and one person was stabbed. These matters were given newspaper publicity. Some of the carriers' employees crossed the picket line to provide pick-up and delivery service. Some attempted to give the service by making deliveries at the curb adjacent to plaintiff's factory. Defendant Roadway Express, Inc., had a walkout of its own employees when it threatened to discharge one for failure to cross the picket line."

In the course of the opinion the trial court states:

> "With these conditions facing the carriers they were compelled to weigh the damage to commerce in general against an attempt, with no assured success, of furnishing to plaintiff a service that was a convenience at times, but the lack of which did not prevent plaintiff from moving its goods in commerce. It might have been more courageous—it might have been more pleasing to plaintiff—had the carriers elected to do battle on the picket line at plaintiff's factory. But we believe when seventeen carriers, defendants here and all other carriers which serve St. Louis and are not defendants here, elect to follow the same course, over a period of time, that the very number of carriers so acting is substantial evidence that the operation of which plaintiff complains was impracticable and substantial evidence that the carriers were acting in a reasonable and prudent manner."

Such findings and conclusions of the trial judge are fully supported by the evidence. Plaintiff, in its petition for injunctive relief filed July 14, 1952, alleges thirty-three acts of violence or threats thereof during the period from February 10 to June 10, 1952. An injunction was granted

on July 24, 1952, enjoining mass picketing and acts of violence against plaintiff, its employees, customers, and transportation agencies. The fact that this injunction was outstanding was a factor to consider in evaluating the evidence on violence and the danger thereof. A similar injunction was in effect in the **Pacific Gamble Robinson** case. Plaintiff, in its motion to enlarge the injunction, filed on December 23, 1953, alleges the continuance of violence, threats, and bodily harm on the picket line, and the obstruction of ingress and egress to plaintiff's premises. In said motion the plaintiff states:

> "5. Picketing by defendants, their agents, representatives, servants and employees, of the place of business operated by plaintiff is so entwined and enmeshed with violence, threats thereof, and other similar and related unlawful conduct of defendants, their agents, representatives, servants and employees, occurring on the picket line and at other places, has rendered it impossible for the plaintiff to properly operate its business, and said unlawful conduct has continued, despite the issuance of the Court's decree herein, temporarily enjoining such unlawful conduct."

In the record are also two petitions of plaintiff for a show cause order, alleging violations of the injunction, one being based on the severe stabbing of an employee, and the other being based on threats of violence and the blocking of a driveway to plaintiff's premises on September 5, 1953. Arthur John Meier, plaintiff's president and general manager, testified in part:

> "From July, 1952, to December, 1953, the 'picketing varied to such a degree that you couldn't tell' one day where it was love and roses for a month or a week when all of a sudden it would flare up. It would appear to us a flare-up would occur whenever a new man would come around and either he joined up—I recall

one particular instance where the report came to us of a gun being in evidence, that being submitted through one of our foremen's reports. We reported that to the police, it is a matter of record. It would die down for several days or a week, then somebody would get all heated up. A temporary restraining order was issued on July 24, 1952. Even after the issuance of the temporary restraining order the picketing union refused to comply with the terms of the order and continued with their violence, threats, coercion and intimidation."

There is additional testimony bearing on the violence issue, but we believe that the evidence hereinabove set out affords ample support for the court's findings as to violence.

The **Pacific Gamble Robinson** case involved the determination of the issue of when a request for transportation was reasonable, and did not involve the construction of an impracticable operation tariff such as we are considering here. However, we are convinced that evidence which would be sufficient to warrant a denial of transportation on the basis that the request was not reasonable would be ample to support an excuse for failure to provide service under the impracticable operation tariff.

An appraisal of the evidence here, upon the basis of the tests prescribed in the **Pacific Gamble Robinson** case, leads us to the conclusion that the trial court was warranted in finding that the defendant carriers were excused under the impracticable operation tariff from performing the pick-up and delivery service to which the plaintiff here claims it was entitled.

Because of the foregoing conclusion we do not reach the question of whether a proper construction of the impracticable operation tariff would excuse performance by the

carriers if only peaceful picketing had been present or had been involved.

The impracticable operation tariff provides for a special charge for pick-up and delivery service. Such charge is refunded by the carrier if the service is not used. The plaintiff has collected all such refunds due it.

There were a few instances in which over-the-road service was not provided by certain motor carriers. This consisted of an embargo by Roadway Express from September 9, 1953, and a refusal by Tucker to handle merchandise from Cape Girardeau to St. Louis. Such transportation was taken care of by other carriers. The over-the-road service is not covered by the impracticable operation tariff, but such service could be refused in the event the evidence established that the request for service was not reasonable. The trial court concluded that the only damage caused by these failures to furnish over-the-road service would be the damage sustained by the plaintiff in the loss of pick-up and delivery service.

We agree with the trial court that the plaintiff has not established any individual liability against the carrier defendants, and that no liability has been established against the union defendants unless it should be upon the basis of boycott, which issue we will hereinafter discuss.

3. **Boycott Issue.**

Plaintiff seeks damages against the unions and the union representative on the basis that such defendants induced and encouraged their union members who were employees of the motor carrier defendants to engage in a concerted refusal to provide plaintiff with transportation facilities, and that such conduct rendered said unions and union representative liable to the plaintiff for damages it incurred by reason of the loss of transportation facilities.

Such damages are claimed under 29 U. S. C. A., § 187 (a) (1) (4) and (b), which provides:

> "§ 187. **Boycotts and other unlawful combinations; right to sue; jurisdiction; limitations; damages.**
>
> "(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—
>
> * * * * * * *
>
> "(4) * * * Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.
>
> "(b) Whoever shall be injured in his business or property by reason or [of] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover damages by him sustained and the cost of the suit."

29 U. S. C. A., § 158 (b) (4), using the same language, makes a secondary boycott an unfair labor practice. This statutory law "restricts a labor organization and its agents in the use of economic pressure where an object of

it is to force an employer or other person to boycott someone else," **National Labor Relations Board v. Denver Building & Construction Trades Council et al.**, 341 U. S. 675, 687.

It is to be noted that the foregoing statutes prescribe secondary boycott activities only by labor organizations. The prohibition does not extend to individual members of such organizations or to the employer.

The trial court dismissed the secondary boycott count stating:

> "A complete answer to plaintiff's claim under Count II can be found in its failure to carry the burden of proving union action or concert of action to deny plaintiff pick-up and delivery service, and the absence of a basis for recovery under Count I (A) is the legality of the picket line clause in the labor contracts in issue.
>
> "We can find no substantial evidence of concert of action by the unions as charged. Rather the record shows a pattern of individual action and group action co-extensive with the employees of each carrier or carriers. This is reflected in the passage of several months before all carriers were failing to furnish the plaintiff pick-up and delivery service. It is further evident in the conduct of some carrier employees crossing the picket line."

The union activity was the subject of a pre-trial stipulation which is incorporated in full in the trial court's findings, and is summarized in the court's opinion as follows:

> "The activity of the union, as we view the record, extended to telling their men they did not have to cross the picket line at plaintiff's factory under their contracts with the carriers."

There is some evidence to support the plaintiff's contention on this issue. The trial court had the benefit of hearing

and observing the witnesses. Upon appeal the evidence must be viewed in the light most favorable to the prevailing party. We cannot say that the trial court's findings on this issue are not based on substantial evidence or are clearly erroneous. Moreover, we have heretofore found for defendants on the impracticable operation issue on the basis that the evidence supports a finding that pick-up and delivery service by the carriers was excused by reason of violence and threatened violence on the picket line. Such finding and the evidence supporting it could well afford the basis for an inference that the violence and threats thereof on the picket line were the inducing cause for the refusal of the carriers' employees to cross the picket line.

What has heretofore been said requires an affirmance of the trial court's dismissal of the claim based on secondary boycott. We pretermit consideration of the controversial issue of whether the rule announced in **In re Conway's Express**, 87 N. L. R. B. 973, affirmed sub nom **Rabouin v. National Labor Relations Board**, 2d Cir., 195 F. 2d 906, 912, to the effect that "Consent in advance to honor a hot cargo clause is not the product of the union's 'forcing or requiring any employer * * * to cease doing business with any other person' ", should be followed. A majority of the Board has repudiated the rule announced in the **Conway** case. See **McAllister Transfer, Inc.**, 110 N. L. R. B. 1769; **Sand Door** case, 113 N. L. R. B. No. 123.

4. **Injunction Issue.**

The trial court, with reference to the injunction issue states:

> "Count III for injunctive relief is now moot as all carriers are now furnishing service without complaint as to its character by plaintiff."

The evidence conclusively establishes that the plaintiff has had no transportation problem since June of 1954, and there

is nothing in the record to indicate that plaintiff's transportation problem is likely to recur. We have affirmed the trial court's findings and conclusion upon the other issues involved in this case. We are convinced that the trial court did not abuse its discretion in dismissing plaintiff's claim for injunctive relief.

The motion to tax costs of the supplemental record to the plaintiff, filed by the defendants, is sustained, and such costs will be taxed to plaintiff.

The judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Office - Supreme Court, U
FILED
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JOHN T. FEY, Cler

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 328.

MEIER & POHLMANN FURNITURE COMPANY,
a Corporation,
Petitioner,

v.

HAROLD J. GIBBONS, Individually and as Officer, Agent and Member Representative of Warehouse & Distribution Workers Union, Local 688, A. F. L., Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, A. F. L., and All Other Members of Said Local Union, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

(Names of Parties and Their Attorneys Listed on Reverse Side of Cover.)

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IN THE

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BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported in 233 F. 2d 296 (adv. sheets July 9, 1956). The Opinion of the United States District

Court for the Eastern Judicial District of Missouri, Eastern Division, deciding the case on the merits is not reported in the Federal Supplement. It is reproduced at page 165 of Volume 1 of the record. The Opinion of the United States District Court denying a temporary injunction is reported in 113 F. Supp. 409.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1). The judgment of the Court of Appeals for the Eighth Circuit was entered on April 26, 1956. Petitioner's motion for rehearing was filed within the time allowed by law and was denied on May 23, 1956 (233 F. 2d 296).

STATUTES INVOLVED.

The pertinent statutes are Interstate Commerce Act, Part 1, 24 Stat. 379, 41 Stat. 474, 49 U. S. C., § 1 (4); 24 Stat. 380, 41 Stat. 479, 49 U. S. C. 3 (1); Interstate Commerce Act, Part 2, 49 Stat. 558, 54 Stat. 924, 49 U. S. C. 316 (b), 49 U. S. C., § 316 (d); Labor Management Relations Act of 1947, 49 Stat. 452, 61 Stat. 140, 65 Stat. 601, 29 U. S. C. 158 (b) (4); 61 Stat. 158, 29 U. S. C., § 187.

QUESTIONS PRESENTED.

The trial court held that petitioner had failed to sustain its burden of proof on Counts I, Ia and II and that the injunction issue of Count III was moot (R. 177, 178, 181, 183, 186, 187). On appeal, the Court of Appeals held that the findings of the trial court on Counts I, Ia and II were sustained by the evidence and that the trial court did not abuse its discretion in holding that the injunction issue presented by Count III was moot (233 F. 2d 302, 306, 307). In view of these findings, we have drafted the questions

presented on the assumption that petitioner is bound by the facts as found by the trial court.

1. Is a shipper's request for pick-up and delivery service reasonable within the meaning of parts 1 and 2 of the Interstate Commerce Act where a legally established picket line surrounds the shipper's plant and there is violence on the picket line?

2. Does the existence of violence on a picket line surrounding the shipper's plant excuse carriers from furnishing pick-up and delivery service to the shipper where the applicable tariff provides that such service need not be furnished when impracticable because of a "riot, strike, picketing or other labor disturbance?"

3. Did petitioner estabilsh a conspiracy as a matter of law by proving that (a) some years prior to the legal picket line at its plant the union and carrier respondents, except Railway Express, Wabash and New York Central, entered into a contract, containing a clause in language all but identical with 49 Stat. 452, 61 Stat. 140, 65 Stat. 60, 29 U. S. C. 158 (b) (4) (a), and 61 Stat. 158, 29 U. S. C. 187 (a) (4), providing that employees shall not be subject to discharge for refusal to cross a legal picket line; (b) that there was violence on the picket line and, (c) pick-up and delivery service afforded it by the carriers did not cease at the same time?

4. Did the failure of Railway Express, Wabash and New York Central to furnish pick-up and delivery service where the petitioner's plant is surrounded by a legally established picket line and there is evidence of violence on the picket line make them as a matter of law members of the claimed conspiracy?

5. Does the negotiation of picket line and assignment of work clauses in union contracts and the fact that the union from time to time informed carrier employees that

they need not cross a legally established picket line at petitioner's plant amount to a secondary boycott as a matter of law within the meaning of 29 U. S. C. A., § 187?

STATEMENT OF THE CASE.

Petitioner instituted this action in the United States District Court for damages and injunctive relief against thirteen common carriers by motor vehicles, all of which operate in interstate commerce by virtue of Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission, the Railway Express Company, two railroad companies, Ben Gutman Truck Lines, Inc., which handles transfer traffic between the on-track station of the New York Central Railroad Co., a respondent herein, in East St. Louis, Illinois, and St. Louis, Missouri, an individual union representative and several unions (R. 1-9).

The "petition" is in four counts. In Count I petitioner seeks damages allegedly caused by failure of the carriers to furnish pick-up and delivery service because of an illegal conspiracy against petitioner. Count Ia eliminates the conspiracy charge and seeks damages based on the individual action of each defendant. Count II seeks damages against the union respondents on the ground they violated the provisions of 29 U. S. C., § 187 (secondary boycott provision of Taft-Hartley). In Count III petitioner sought an injunction to compel respondents to furnish it pick-up and delivery service (R. 1-9, 92).

The case was tried by the court without a jury. A final judgment dismissing the case on the merits as to all respondents was entered. The trial court in its opinion summed up its reasons for denying petitioner relief in the following language:

> "The weakness and a fatal one in our judgment, to plaintiff's case is not that we are without jurisdic-

tion to entertain it as pleaded but that the proof failed to sustain any charge of wrong-doing for which the defendants are liable in damages to it" (R. 187).

The motor carrier respondents have three union contracts. One covers city drivers, another covers platform workers and dockmen and the third covers over-the-road drivers (Supp. R. 40-41). Over-the-road drivers handle merchandise transported inter-city. The platform workers and dockmen handle the merchandise on the docks. The city drivers perform pick-up and delivery service (Supp. R. 40-41).

The city drivers' and platform workers' and dockmen's contracts are negotiated between the Union and the employers with the assistance of the Motor Carriers' Council. It exists to aid members in negotiating contracts and labor relations (Supp. R. 66). When it is time to negotiate a contract the Council calls a general meeting of the carriers. At the meeting a committee of 15 to 25 is selected to negotiate the contract. When agreement is reached, the Union presents the contract to each carrier for signature. There is no understanding that the carriers must sign the contracts as presented to them (Supp. R. 68-69). On a few occasions during the 1952 negotiations certain of the carriers signed contracts with the Union prior to the end of the strike. However, none of them was able to execute an agreement without a picket line clause (Supp. R. 69).

The city drivers' and platform workers' and dockmen's contract from July 1, 1947 to June 30, 1948 did not contain a picket line clause. The negotiations of the 1948 contracts were the first after the passage of Taft-Hartley. At that time the Union demanded a picket line clause. Both the employers and the Union were represented by counsel because of the newness of Taft-Hartley (Supp. R. 70).

At the conclusion of the negotiations a contract was entered into for the period commencing July 1, 1948 and ending June 30, 1950. It contained a picket line clause which reads as follows:

> "It shall not be a violation of this agreement, nor shall the employees covered hereunder be subject to discharge for refusal to cross a picket line, and perform work in any instance where the picket line has been legally established by the Union picketing" (Ex. 1-B, R. 226).

In negotiating the 1952 city drivers' and platform workers' and dockmen's contracts a strike ensued. The Federal Mediation Service attempted to mediate the matter and the State Labor Board offered its assistance. Finally the strike was settled in the Mayor's office at 4:30 A.M. by agreeing to a new contract containing a picket line clause. At that time the Union sought a hot cargo clause in the city drivers' contract, but was unsuccessful. At no time during these negotiations did the Union indicate it would withdraw the "picket line" clause from the contract (Supp. R. 67, 69-70). In 1952 defendant Ben Gutman negotiated its own contract with the Union. In its negotiations it did not confer with the other carriers (Supp. R. 64).

Petitioner's chief complaint as to discrimination in shipping was a failure to get pick-up and delivery service. At a pre-trial conference petitioner agreed that all motor carriers except Eastern Motor Express, Roadway Express and L. A. Tucker Truck Lines furnished all service except pick-up and delivery service (R. 92).

Petitioner failed to prove that any service, whether over the road or otherwise, was denied by reason of the hot cargo or unfair goods clauses of the Union contracts (233 F. 2d 305, 306, Printed Opinion 16).

Petitioner manufactures dining room and dinette furniture (Supp. R. 12). Its employees went out on strike in December, 1951. Its president pleaded with the men to return to work. He believed that bargaining couldn't be handled effectively "with a whip over our head." They came back (Supp. R. 18). Thereafter, in February of 1952, all of petitioner's production employees except supervisors went out on strike (Supp. R. 13). A picket line was thrown around petitioner's plant (Ex. 1-D-6, R. 267). The strike was legal in that it was called by a union certified as the bargaining agent of certain of petitioner's employees (R. 92).

At the pre-trial conference petitioner stated that its position at trial would be that picketing at its plant has been almost continuous and had been peaceful since at least "March, 1953, on which occasion a picket followed one of plaintiff's (petitioner's) employees to the United States Post Office and there stabbed him six times." The order provided that any defendant (respondent) may offer evidence contrary to petitioner's position (R. 118).

On July 14, 1952, petitioner filed suit in the St. Louis Circuit Court to enjoin the Union and its members from intimidating and coercing its employees who had not gone out on strike as well as the intimidation of its officers, officials and supervisors. The verified petition alleged 33 acts of violence and threats between February 10 and June 10, 1952 (Ex. 1-D-6, R. 267-270, Supp. R. 95-96). On July 24, 1952, an injunction was granted against mass picketing and acts of violence against petitioner, its employees, customers and transportation agencies. The order limited pickets to six at any one time (Ex. 1-D-7, R. 271-272, Supp. R. 96).

After issuance of the injunction Earl T. Overman, foreman of petitioner's shipping room, was stabbed outside the Bremen Branch Post Office (Ex. 1-D-1, R. 263-264, Supp. R. 87). Prior thereto one of the pickets blocked the

entrance to petitioner's place of business and prevented the ingress of one Judd by the use of force. On another occasion the same picket parked an automobile across petitioner's driveway to prevent the ingress and egress of persons and vehicles to and from petitioner's premises. These instances and the stabbing instance caused petitioner on September 9, 1953, and December 15, 1953, to file petitions for orders to show cause why contempt citations should not be issued (Ex. 1-D-4, Ex. 1-D-5, R. 263-266, Supp. R. 94-95). Thereafter, on December 23, 1953, petitioner filed a motion to enlarge the injunction previously issued. That motion alleged:

> "4. Defendants, their agents, representatives, servants and employees are either unwilling or unable to picket peacefully and lawfully and to comply with the terms of the Court's decree herein enjoining only acts of violence, threats thereof, and other similar and related unlawful conduct.
>
> "5. Picketing by defendants, their agents, representatives, servants and employees of the place of business operated by plaintiff is so entwined and enmeshed with violence, threats thereof, and other similar and related unlawful conduct of defendants, their agents, representatives, servants and employees, occurring on the picket line and at other places, has rendered it impossible for the plaintiff to properly operate its business, and said unlawful conduct has continued, despite the issuance of the Court's decree herein, temporarily enjoining such unlawful conduct" (Ex. 1-D-3, Supp. R. 93-94, R. 261-262).

Petitioner's president testified that from July, 1952, to December, 1953, the "picketing varied to such a degree that you couldn't tell, one day where it was love and roses for a month or a week, when all of a sudden it would flare up. It would appear to us a flare-up would occur

whenever a new man would come around and either he joined up—I recall one particular instance where the report came to us of a gun being in evidence, that being submitted through one of our foreman's reports. We reported that to the police; it is a matter of record. It would die down for several days or a week, then somebody would get all heated up. A temporary restraining order was issued on July 24, 1952. Even after the issuance of the temporary restraining order the picketing union refused to comply with the terms of the order and continued with their violence, threats, coercion and intimidation" (Supp. R. 23).

The pickets called petitioner's truck driver bad names when he was going back and forth across the picket line. They used curse words and threatened him. They said if he didn't quit they would follow him home. Petitioner's trucks were forced over to the curb "plenty of times." They tried to make the driver have a wreck by pulling in front of him and then they would "cut right back in." He would go "over to the side" to avoid a wreck (Supp. R. 84).

The number of pickets varied, sometimes there was one picket, sometimes five or six. Most of the time there were two or three pickets (Supp. R. 85). When people entered the plant in the morning and left at night pickets would call and shout to them, they would call them bad names (Supp. R. 83).

After appearance of the picket line most carriers made a first pick-up or delivery. There was no consistency (Supp. R. 52). Truck lines and carriers other than the respondents in this action refused pick-up and delivery service. In fact, all carriers refused such service. Petitioner's dock superintendent, in answer to a question as to how many carriers refused pick-up and delivery service, said, "We got a thousand other carriers" (Supp. R. 58). Pri-

vate companies from whom petitioner bought hardware ceased making deliveries (Supp. R. 28). Petitioner's plant manager could not say why local suppliers ceased making deliveries. He thought that perhaps it was the picketing or perhaps they didn't like the location (Supp. R. 57). When drivers of trucks approached the plant to make deliveries the pickets would talk to the drivers and "they would drive on; they would make the trial." This happened on "hundreds of occasions" (Supp. R. 83-84). Truckload shipments were spotted near petitioner's plant until June, 1953 (Supp. R. 52), and on some occasions drivers crossed the picket lines (Supp. R. 47-48).

The Union from time to time advised the city drivers that under the terms of the collective bargaining contracts between the motor carriers and the unions that they are not required in the course of their employment to make deliveries to or pick-ups from petitioner's premises whenever it will necessitate their crossing an existing picket line (R. 93). The platform workers and dockmen were advised that under the terms of their contract they are required to handle, work on and move in all instances petitioner's goods (R. 93, Supp. R. 4). Harold Gibbons, the International Trustee, testified that he could not think of a single instance where the union utilized the picket line clause. He was sure that there were strikes and the odds are that the employees did the relying on the picket line clause (Supp. R. 49).

In May, 1954, the pickets were removed and thereafter petitioner was furnished pick-up and delivery service (Supp. R. 14, 72).

ARGUMENT.

I.

Certiorari Will Not Be Granted for the Purpose of Reviewing Evidence.

Petitioner by straining and misconstruing the opinion of the Court of Appeals seeks a new trial in this Court by means of certiorari. To avoid the well established rule that certiorari will not be granted for the purposes of reviewing evidence, petitioner has phrased the questions presented differently from the way it presented them in the Court of Appeals (296 F. 2d 300, Printed Opinion 4-5). The decision for respondents in this case was based on evidence. None of the defenses were ruled for respondents as a matter of law. Consequently to upset the decision of the Court of Appeals, petitioner is asking this Court to review the evidence. This Court has long followed the practice of denying review by certiorari in such cases.

In **U. S. of America v. Johnston**, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1924), Justice Holmes, speaking for this Court, stated the rule as follows:

> "We do not grant a certiorari to review evidence and discuss specific facts."

In **General Talking Pictures Corp. v. Western Electric**, 304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273 (1937), the court said:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

In endeavoring to avoid the rule above stated, petitioner has assumed that the court below held that the Interstate

Commerce Act was modified by the Labor Management Relations Act so that carriers subject to the latter act could by union contract relieve themselves of the statutory duty imposed on them as common carriers. Such assumption ignores both the duties imposed on the carriers and the facts that the labor contracts were used by petitioner in an effort to establish a conspiracy.

Carriers' duties are defined by statute. Part I of the Interstate Commerce Act obligates rail carriers "to furnish * * * transportation upon reasonable request." 24 Stat. 379, 41 Stat. 474, 49 U. S. C. 1 (4). Motor carriers are required to observe "just and reasonable regulations" and "unjust discrimination" is prohibited. 49 Stat. 558, 54 Stat. 924, 49 U. S. C. 316 (b) and 316 (d). In each instance the question is whether the request for service is reasonable. The carriers' duty is not absolute. In this case both rail and motor carriers had tariffs excusing the furnishing of pick-up and delivery service where impracticable because of a "riot, strike, picketing or other labor disturbance" (Ex. 19-D-A, R. 287, R. 92). The Court of Appeals held that the finding of the trial court that the furnishing of pick-up and delivery service was excused because of violence on the picket line was supported by substantial evidence (296 F. 2d 305, Printed Opinion 15).

Because the furnishing of such service was excused under the impracticable operation tariffs, the trial court and the Court of Appeals both concluded that petitioner had failed to carry its burden of proof on conspiracy, whether or not the picket line clause of the union contracts is illegal (233 F. 2d 302, Printed Opinion 8). Furthermore, the court in passing on the picket line clause held that such a clause could validly be inserted in the contract. However, it does not of necessity relieve the carrier of its duty to serve. In this connection the Court of Appeals said:

"We can find no reason why the parties, if they so choose, cannot validly insert a picket line clause in their labor contract. It would not necessarily follow that the insertion of such a clause would prevent a strikebound plant from making a reasonable request for transportation service, or that the refusal by an employee protected by a picket line clause to cross a picket line would furnish the carrier a defense under an impracticable operation clause. However, the fact that the Interstate Commerce Commission approves an impracticable operation tariff of the type hereinabove quoted would seem to have some bearing on the reasonableness, as a matter of public policy, of permitting such a clause in a labor contract involving transportation" (233 F. 2d 301, Printed Opinion 7).

The Labor Management Relations Act specifically recognizes the right of an employee to refuse to cross a picket line legally established against an employer other than his own. 49 Stat. 452, 61 Stat. 140, 65 Stat. 601, 29 U. S. C. § 158 (b) (4); 61 Stat. 158, 29 U. S. C., § 187. Clearly, embodying the provisions of the act into a union contract cannot be construed as giving rise to a conspiracy. Furthermore, the conclusion of the court that the conduct of the carriers stemmed from individual decision of the carriers rather than as a result of agreement, tacit or express, was supported by substantial evidence.

II.

There Is No Conflict of Decision.

Petitioner claims that the decision in this case conflicts with "**Southern Steampship Co. v. N. L. R. B.**, 325 U. S. 797, 89 L. Ed., 1939." An examination of the citation discloses that the reported case is **Allen Bradley Company**

et al. v. Local Union No. 3, International Brotherhood of Electrical Workers. Further research on our part discloses a case entitled **Southern Steamship Co. v. N. L. R. B.** reported in 316 U. S. 31, 62 S. Ct. 886, 86 L. Ed. 1246 (1941), which we believe is the case relied on by petitioner. In that case petitioner refused to bargain with the union recognized by the N. L. R. B. as the representative of petitioner's employees. Five of petitioner's employees went out on strike while in the port of Houston. The home port of their ship was Philadelphia. Petitioner discharged the five employees. After a hearing the N. L. R. B. ordered the men reinstated with back pay. Petitioner claimed that this order was invalid because the men were guilty of mutiny in violation of § 292 and § 293 of the Criminal Code, then 18 U. S. C., § 483 and § 484, now 18 U. S. C., § 2192 and § 2193. In upholding petitioner's contention, this Court said:

> "The 'shipping articles' which the master and every member of the crew must sign prior to the voyage have been carefully prescribed by Congress, and * * * these articles contain this promise * * * 'to be obedient to the lawful commands of said master * * * in everything relating to the vessel and the stores and cargo thereof, whether on board, in boats or on shore' * * *. On the other hand workers at sea have been the beneficiaries of extraordinary legislative solicitude * * * with respect to such matters as * * * medicines, clothing, heat, hours, watches, wages and return transportation."

Southern Steamship is entirely different from the case at bar. In that case a criminal statute was violated. In this case a fact question involving whether a request for transportation service was reasonable was presented. That case did not involve a construction of the U. S. Shipping Act in the light of the then existing Wagner Act. It in-

volved the mutiny statutes. This case concerned a conspiracy which was not proved. That case did not. The two decisions do not conflict. They involved different issues and principles. **Southern Steamship** does not afford a basis for certiorari.

The opinion in this case does not conflict with **National Labor Relations Board v. Washington-Oregon S. W. D. C.**, 211 F. 2d 149 (C. A. 9, 1954). In that case a petition was filed before the National Labor Relations Board to stop the union from engaging in a secondary boycott. The Board held that the evidence was sufficient to justify holding that the union had engaged in a secondary boycott. When the matter was presented for enforcement in the Court of Appeals the issues were (1) rejection of union evidence, (2) error in admitting certain exhibits, and (3) that the activity of the union was not a secondary boycott because the employer had agreed not to work on non-union products. The Court of Appeals did not pass on the sufficiency of the evidence to support a finding of secondary boycott. In the case at bar the issue was the sufficiency of the evidence to sustain a secondary boycott. The Court of Appeals upheld the trial court's finding that the evidence was insufficient. Consequently, the two decisions do not conflict.

Joliet Contractors' Ass'n v. National Labor Relations Board, 202 F. 2d 606 (C. A. 7, 1953), does not aid petitioner in its efforts to procure certiorari on the basis of a conflict of decision. In that case an employers' association was seeking review of a decision of the National Labor Relations Board. The association among other things sought to have certain union by-laws and working rules declared invalid. They prohibited union members from working on jobs where preglazed sash was used. The object of the union was to prohibit the use of preglazed sash in the Joliet area. The court held that the

by-laws and working rules were not illegal in the absence of a strike or a concerted refusal to work. The court held that proof of the by-laws and working rules did not establish a secondary boycott.

The court held that petitioner had established only one secondary boycott, although it sought to prove many. In that instance three glaziers saw preglazed sash on a job and called the union representative. He told them that you know the condition of the job and union rules, do what is right. Whereupon, they refused to work.

Joliet Contractors supports the opinion of the Court of Appeals for the Eighth Circuit to the extent that picket line clauses in the union contracts standing alone do not prove a secondary boycott.

In the case at bar the Court of Appeals held that there was substantial evidence supporting the finding of the trial court. The court pointed out that the finding of violence and threats on the picket line were the inducing cause for the refusal of the carriers' employees to cross the picket line (233 F. 2d 307, Printed Opinion 18-19). In **Joliet Contractors,** the evidence showed union activity justifying a finding of secondary boycott. In this case the courts below examined the evidence and found it insufficient. Petitioner cannot have the finding of the court below reviewed by certiorari.

III.

CONCLUSION.

Petitioner presented its evidence to the trial court. Its evidence was found insufficient to establish its claims. The Court of Appeals held that the findings of the trial court were supported by substantial evidence. This Court will

not review the evidence by certiorari. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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